Supreme Court, U.S.
FILED

981550 MAR 29 1999

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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET GAYLE HARRIS,

Petitioner,

v.

GENERAL MOTORS POWERTRAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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23pp

QUESTIONS PRESENTED

1) Whether the panel opinion complied with the decisions of this Court and other Federal Circuits when it concluded that the plaintiff did not experience sufficient sexual harassment and denial of rights under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et. seq.*

2) Whether the decision of the panel on the issue of "adverse employment action" and "retaliation" is in conflict with the decisions of this Court and other Federal Circuits.

PARTIES INVOLVED

The following individual appeared as the plaintiff in the United States District Court for the Eastern District of Virginia and as appellant in the United States Court of Appeals for the Fourth Circuit: Janet Gayle Harris.

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OPINION BELOW

A panel of the United States Court of Appeals for the Fourth Circuit Issued an opinion on January 11, 1999 affirming the granting of summary judgement to the defendant. A copy of the opinion is reproduced at Appendix A.

JURISDICTION

The decision of the Fourth Circuit Court of Appeals was decided on January 11, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The plaintiff had filed suit pursuant to 42 U.S.C. § 2000(e), *et seq*. As amended, the Civil Rights of 1964,Title VII.

STATEMENT OF FACTS

The petitioner seeks review of the January 11, 1999 judgement of the United States Court of Appeals for the Fourth Circuit which affirmed the granting of summary judgement to the appellee dismissing the petitioner's lawsuit brought pursuant to 42 U.S.C. § 2000(e) *et. seq*., The Civil Rights Act of 1964 as amended. The petitioner bases her appeal in a large measure on the issue of sexual harassment and sex discrimination by the agents of the defendant-appellee corporation that were acting in the scope of their employment and on behalf of their employer. The Court of Appeals disagreed and affirmed the ruling of the District Court for the Eastern District of Virginia dismissing the cause of action.

The Court of Appeals elected to affirm the District Court's ruling that the plaintiff failed to show that she suffered "sufficient" sexual harassment by co-workers of the defendant-appellee corporation. Moreover the Court ruled that the plaintiff did not suffer sufficient "adverse"

employment decisions and retaliation in violation of Title VII of the Civil Rights Act of 1964 as amended. This decision conflicts with the decisions of this Court and other Circuits wherein there are no uniform standards as to the components of "adverse employment" decisions.

On January 11, 1999 the Court of Appeals issued an unpublished *per curium* opinion affirming the District Court's decision to dismiss the case.

REASONS FOR THE GRANTING OF THE WRIT

I. The Panel Opinion Concluded That the Plaintiff Did Not Suffer Sex Discrimination Is in Conflict with Opinions of this Court and Decisions of Other Circuit Courts of Appeals.

The Supreme Court decreed that sex harassment and sex discrimination is protected against by Title VII of Civil Rights Act of 1964 as amended U.S.C. § 2000(e) *et. seq. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In *Vinson, supra* the Court held that a female that is subjected to sex harassment has a viable cause of action against her employer when the terms and conditions of employment are altered or interfered with by an agent of the employer. This was further amplified by *Harris v. Forklift Systems Inc.*, 510 U.S. 179 (1993) wherein this Court noted that the standards to be that the plaintiff need not prove psychological harm in a hostile environment case. The opinion alludes to the fact that the elements of a hostile work environment to be conduct which is severe or pervasive enough to create an environment that a reasonable person could find to be abusive or hostile and is also subjectively perceived by the alleged victim to be abusive. The Court then went on to list several factors that should be considered in ascertaining if there is a hostile work

environment including the fact that is unreasonably interferes with the work performance of the victim.

This Court, during the past term in the cases of *Burlington Industries v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998) further strengthened the rights of a complainant by imposing liability on an employer based upon the conduct of a co-worker or supervisor. While this case does not involve *quid pro quo* sexual harassment, the language of the opinion suggests that there is liability on an employer where there is a hostile work environment caused by co-worker and the situation is not ceased immediately. In the case at hand the petitioner alleged that she was denied terms and conditions of employment in violation of 42 U.S.C. § 2000(e)-2(a)(1). The petitioner is the only female worker in maintenance at the General Motors Powertrain facility located in Fredericksburg Va.

The Court of Appeals failed to consider the totality of circumstances that the petitioner faced at the facility which included sexual harassment, a hostile work environment and the denial of overtime in accordance with the "equalization" provision of the labor-management agreement. When the plaintiff filed a formal grievance with management in accordance with the provisions of the labor-management agreement, she was "excessed from her job classification of "prototype" and reassigned to the maintenance shop. The employer's reasons were the so-called "lack of work" however the records of the employer do not support that position as the work schedule of the employer continued and the high rate of overtime was given to Moats and Knight.

The opinion of the Court of Appeals indicates that a male on her shift was not given overtime, thus defeating the claim of gender discrimination. (*See* opinion of the Court in Appendix A).This reasoning is false as the petitioners claim of gender discrimination is to be considered between herself and Moats and Knight. The Court of Appeals noted that the bulk of overtime was in fact granted to Moats and Knight, thus defeating the Argument of the Court of Appeals. It is the claim of the petitioner that must be considered not that of a no-complaining co-worker.

The Court of Appeals also noted, in a footnote on page 5 of the slip opinion, that the petitioner is barred from raising the issue of the denial of overtime during the temporary transfer back to prototype because it was not raised in her complaint and was first noted in her affidavit in support of the opposition to the motion for summary judgement. That position flies in the face of the decision of this Court in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3 (1984) quoting *Conley v.Gibson,* 355 U.S. 41, 47 (1957). In the case of *DeNovellis v. Shalala*, 124 F.3d 298 (1st Cir. 1997), the Court noted, at page 310 n.6 on this issue, that this view misconstrues the purpose of notice pleading in federal litigation wherein a complaint need not clearly articulate the precise legal theories upon which a plaintiff bases his right to recovery. The complaint must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The Court of Appeals for the Fourth Circuit failed follow this doctrine and failed to consider the position of the appellant in her claim for gender discrimination based upon her allegations in her affidavit in support of the opposition to the motion for summary judgement. Thus, this Court should reverse the opinion of the Court of Appeals with directions to reconsider its ruling based upon the decisions of the Supreme Court .

II. The Petitioner Suffered Adverse Employment Action When She Was Retaliated Against by the Appellee for Engaging in Protected Employment Conduct.

The Court of Appeals failed to consider the recent rulings of the Supreme Court and the decisions of other Circuit Court of Appeals in deciding that the plaintiff did not suffer adverse employment consequences as a result of any alleged retaliatory conduct by the appellee.

In the recent decision of *Ellerth, supra*, the Supreme Court noted, at 118 S.Ct. 2257, 2268, that an adverse employment action constitutes a significant change in employment status. One of the criteria included in the list is reassignment with significantly different responsibilities. This action must be taken by a supervisor, which is applicable to this case. While *Ellerth., supra,* involved *Quid pro quo*, sexual harassment, the same rationale applies to the facts at hand. The attitude of the Fourth Circuit is that "no harm, no foul" is improper and has been rejected by 9th Circuit Court of Appeals in *Hashimoto v. Dalton*, 118 F.3d, 671, 673 (9th Cir. 1997); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, (9th Cir. 1989). In *Hashimoto, supra* the Court ruled that a negative job reference was retaliatory conduct and was an adverse employment decision. In *Hacienda, supra*, the Court noted that pregnancy discrimination was an adverse employment decision, even though the victims were reemployed. In the case of *Smart v. Ball State University*, 89 F.3d, 437, 440-41 (7th Cir. 1996) the Court noted the breadth of the definition of "adverse employment action." *Knox v. State of Indiana*, 93 F.3d 1327, 1335 (7th Cir. 1996). In *Randlett v. Shalala,*118 F.3d 857, (1st Cir. 1997),the Court of Appeals noted that a refusal to transfer was not outside the range of Title VII violations. The 8th Circuit has adopted a more restricted view in *Ledergerber v. Stangler et al.*, 122

F.3d 1142, 1144 (8th Cir. 1997) wherein they noted that a transfer involving only minor changes in working conditions and no reduction in pay or benefits does not constitute an adverse employment action. While the petitioner in the case at hand did not suffer a loss in pay, she did suffer a loss in ***overtime*** pay which adversely affected her job benefits. Thus even by this restrictive standard the plaintiff could still claim that she suffered an adverse employment decision that was retaliatory. The standard of the 4th Circuit is even more restrictive (followed in the case at hand),as noted in *Munday v. Waste Management of North America Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) that there is no adverse employment action without evidence that the terms and conditions or benefits of employment were adversely affected. *Page v. Bolger,* 645 F.2d 227, 233 (4th Cir. 1981) (*en banc*) *cert. denied,* 454 U.S. 892 (1981). The 5th Circuit Court of Appeals, in the case of *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). *cert. denied,* 118 S.Ct. 336 (1997), adopted the 4th Circuit test that focuses on the "ultimate employment decision" not merely on "interlocutory" or "mediate decisions" that has "a mere tangential effect on a possible ultimate employment decision"

On May 26,1998,the EEOC issued new guidelines on retaliation. The EEOC disagreed with the 5th Circuit's holding in *Mattern,* finding that it and similar decisions "unduly restrictive". *See* EEOC Interpretive Guidelines, Vol.8 sec. 614:0005.

The 2nd Circuit Court of Appeals has adopted a reasonable definition of adverse employment decisions by holding that the loss of employee benefits, such for being excluded from department meetings and client outings constituted adverse employment decisions. *Preda v. Nissho Iwai American Corp.*,128 F.3d 789, 791 (2nd Cir. 1997).

A reading of the cases from the several Circuit Courts clearly indicates that there is confusion in the Appellate Courts as to the standards that are to be considered in deciding what sort of conduct constitutes "adverse employment decisions" so as to bring about a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et. seq.* It is essential for this Court to eliminate the split in Circuits and follow its rulings in *Meritor* and *Harris*, *supra*, as well as other decisions of this Court *Robinson v. Shell Oil Company*, 117 S.Ct. 843 (1997) and *Rutan v. Republican Party*, 497 U.S. 62 (1990). This Court should also follow the intent of Congress and the agency designated to enforce Title VII. The EEOC in deciding what constitutes "adverse employment decisions". The restrictive views of some Circuit Courts of Appeals are contrary to the intent of Congress and the interpretation by the EEOC and should be reversed by this Court.

CONCLUSION

When the trial and appellate court restrict the rights of the petitioner to seek relief from sex discrimination and sex harassment by a restrictive view of her rights to be free from adverse retaliatory decisions this Court must grant review and delineate the proper uniform test for an employer's liability for this conduct.

Respectfully submitted,

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